IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 49

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140 Madison Avenue Corp. and Williams & Co., Inc.,

Petitioners,

against

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius M. Cole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

WILBUR DUBERSTEIN,
FREDERICK E. WEINBERG,
Counsel for Respondents.

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149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
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—against—

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

The Circuit Court of Appeals, Second Circuit, unaniniously affirmed a judgment in favor of the Plaintiffs' Respondents' entered in the United States District Court, Southern District of New York, upon a decision of the Honorable William Bondy, United States District Judge (pp. 81-5). The trial comprised six days and was without a jury (205). The decision of the Circuit Court was accompanied by an opinion *per curiam* (pp. 81-4).

Judgment appealed from (205-210).

Decision and Opinion of the Trial Court (184-202).

Findings of Fact and Conclusions of Law (160-182).

Opinion of the Circuit Court of Appeals delivered upon the decision of affirmance (pp. 81-4).

The Nature of the Action.

This was an action brought by certain service employees of a loft building operated by the defendants to recover additional compensation, liquidated damages and attorneys' fees allegedly due under 29 U. S. C. A., Sections 207, 216(b) also known as the Fair Labor Standards Act of 1938. Under a stipulation entered into while the appeal was pending in the Circuit Court, the defendants paid the sums due for the employment period prior to April 20, 1942 and expressly conceded that the entire employment period was covered by the provisions of the Act (216-221). The effect of that stipulation was to confine the appeal to the question of whether the defendants, during the period succeeding April 20, 1942, had paid the plaintiffs for their overtime hours at the rate of at least 1½ times the regular rate of employment as required by Section 207(a) of the Fair Labor Standards Act.

The Facts.

The Fair Labor Standards Act, effective October 24, 1938, provided that any hours worked above a stated maximum workweek in affected industries must be compensated at the rate of not less than 1½ times the regular rate of employment. For the period with which we are here concerned, the maximum statutory workweek was fixed at 40 hours. 29 U. S. C. A., Section 207(a). It was further provided that non-compliance with this provision would render the employer liable for the payment of additional sums as

liquidated damages and attorneys' fees (id., Section 216).

Throughout the period of approximately 4 years which had intervened between the effective date of the Act and the period of employment with which we are here concerned, these defendants, together with the employers of service employees in loft buildings in the New York City area generally, had been acting in clear violation of the Fair Labor Standards Act. That gave rise to the liability which was paid and the corresponding claim severed from the present suit while the appeal was pending in the Circuit Court of Appeals (216-219). During that period these plaintiffs had been hired for workweeks fixed at 47 and 48 hours (in the case of the night watchman McCole, at 60 hours) and had been receiving compensation for such excessive workweeks in the form of fixed weekly wages (129-132; Ex. 3).

During that earlier period it had been the defendants' constant cry that the Fair Labor Standards Act was inapplicable to the employment of the maintenance and service operatives in loft buildings irrespective of the character of the business conducted by the tenants, and that for that reason the Act was not being violated. This situation was theoretically corrected by two decisions of this Court which were handed down during the early part of June, 1942. In *Kirschbaum v. Walling*, etc., 316 U. S. 517, this Court held that the employment of service employees in buildings of which substantial portions were occupied by tenants in the production of goods for interstate commerce came within the purview of the Fair Labor Standards Act. One week later this decision was supplemented by the decision in *Overnight Motor Trans-*

portation Co. v. *Missel*, 316 U. S. 572, which held that, where the compensation of an affected employment is upon a weekly basis, the regular hourly rate for the calculation of overtime compensation is the quotient of the weekly wage divided by the number of hours worked during the week.

We may pause briefly at this point. The *Kirschbaum* and *Missel* decisions marked a turning point in the history of employment agreements affecting the service and maintenance operatives of loft buildings. Before the announcement of these decisions, payment of a flat weekly wage for a workweek which was substantially longer than the maximum workweek fixed in the Act had been defended upon the ground that the provisions of the Act were inapplicable to such employment. Thereafter that argument was no longer available. After the announcement of these two decisions, it became clear that, if the employers were to continue to use the extra-statutory workweek at a fixed weekly wage, they would have to find some rationalization other than the claim of the inapplicability of the Act. *Adams* v. *Union Dime Savings Bank*, 144 Fed. (2nd) 290, cert. den. 323 U. S. 751.*

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* While the new open shop agreement with which we are here concerned was entered into after the *Kirschbaum* and *Missel* decisions had actually been announced (Ex. 1), the new closed shop agreement had been entered into some months before. In both cases, however, the formula hereafter described was adopted for the concealed purpose of meeting the situation presented by "the prospective application to loft buildings of the Fair Labor Standards Act" (Ex. 4, p. 70, ll. 3-4). The adoption of the formula in the new closed shop agreement was in anticipation of, whereas its adoption in the new open shop agreement was with actual knowledge of, the *Kirschbaum* and *Missel* decisions.

Before examining the nature of the scheme through which these defendants and others had hoped to continue to hire their employees for extra-statutory workweeks at flat weekly wages, we may briefly consider certain of the reasons why the employers have always been so anxious to avoid computing the compensation upon the basis of hourly rates.

One of the important reasons for the employer's desire to fix the compensation upon the basis of a flat weekly wage for a given workweek arose from the circumstance that it enabled him to acquire a bargaining advantage from a certain blind spot which most employees have in common. The employers know that the principal concern of the employee or his union always rests in the amount of the take-home pay at the end of the week. Such additional considerations as the length of the hours or the character of the working conditions are, save only in those now unusual instances where hours or working conditions are oppressive in the extreme, treated as secondary. Accordingly, if an employer can deal with his employees upon the basis of a flat weekly wage for a fixed workweek, the latter will invariably be predisposed to treat the number of hours worked as unimportant. Then the employer, by adopting a form of agreement in which the extra length of the workweek is taken for granted, will invariably be able to pay the same price for, say, a 46 hour workweek which he might otherwise have had to pay for a 40 hour workweek. For that reason, the ability to fix the terms of employment upon the basis of a flat weekly wage for an extra-statutory workweek has always been a cherished bargaining mechanism in the eyes of the employer—a veritable *coup d'etat* which,

Fair Labor Standards Act or no Fair Labor Standards Act, he has been loath to relinquish.*

Sometime during 1942 a formula was adopted, first in the closed shop agreement and later in the open shop agreement, whose purpose was to avert "the prospective application to loft buildings of the Fair Labor Standards Act", to standardize a workweek of "at least forty-six (46) hours a week" and "to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (Ex. 4, p. 70, paragraphs 1 and 3). It is to this formula and the collective bargaining agreement in which it was adopted that we must now turn.

The new collective bargaining agreement was entered into on September 1, 1942 between the Realty Advisory Board on Labor Relations, Inc. representing the employers including these defendants and Local 32B of the Building Service Employees International Union representing the service employees including these plaintiffs (Ex. 1). Although the cover of the agreement bore the legend "National War Labor Board Agreement", the National War Labor Board itself was not a party thereto (id.).

Under that agreement workweeks for employees other than watchmen were fixed at 46 hours per week and for watchmen at 54 hours per week (Ex. 1, pp. 27-8). It then fixed minimum weekly wages, the exact amounts of which were determined by the area of the building (id., p. 25). It has been stipulated that throughout the period with which we are here

* In the case at bar there was a still additional value to the employers in entering into the employment relation upon the basis of flat weekly wages rather than stated hourly rates. This additional purpose of the flat weekly wage will be considered on pages 11 to 13, *infra*.

concerned each of the plaintiffs was employed and paid by the defendants pursuant to the terms of that master agreement: more particularly, that each plaintiff received a flat weekly wage for a fixed workweek whose hours substantially exceeded the statutory maximum (123-6, 127-8, 147-155).

The agreement included a formula which purported to derive the regular hourly rate from the weekly wage. That formula was as follows (Ex. 1, p. 27):

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of forty (40) hours."

The significance of this formula is to be found in an analysis of its effect as a matter of arithmetic. We shall take an illustration of its use, employing for that purpose figures of a macrocosmic order so that the calculation may be made by mental arithmetic. Suppose an employee to be receiving $110 a week for a 50 hour workweek. Applying the formula, his hourly rate would be $110 divided by 55, or $2.00. He would then be listed as having received 40 times $2 or $80.00 for his straight time plus 10 times $3.00 or $30.00 for his overtime, making a total of $110.00.

From this illustration it is apparent that the entire formula was simply a tautology designed to validate a predetermined weekly wage. It caused the weekly wage to be divided in the very same manner and by the very same numbers by which the resultant quotient was subsequently to be multiplied in order to calculate the total weekly payment.

The arithmetical consequence of this device was that, although the hours regularly worked above 40 hours per week may have been overtime hours in theory, they never could yield any additional compensation in fact. The formula served the flat weekly wage as a self-adjusting mechanism. Its real effect was to render that wage the single and indivisible compensation for a workweek in which straight time and overtime were fused, and to render the theory of a special premium for hours regularly worked above 40 a fiction.

The self-adjusting character of the formula had its expected consequence. The defendants' payroll records establish that the formula was never actually used in order to determine the weekly wage. The columns and figures which purported to utilize the formula to derive the regular hourly rate and then to employ that derived rate in order to fix the weekly wage were simply so many instances of window dressing. The proof of that fact rests in the circumstance that, although the payroll recitals of the formula hourly rate, the derivative overtime rate and the incidental calculations were honeycombed with substantial errors of calculation, these errors were in no instance reflected in the statement of the weekly wage. That wage, having been determined antecedently and independently of any calculation which employed the formula, remained constant and "correct" however gross the errors in the use of the formula.

An examination of a few instances of the alleged use of the formula will be instructive. Let us start with Exhibit 6, payroll record 100. It there states that the plaintiff Manne received $28.90 as his total wage for the 46 hour week. The regular hourly rate

under the contract formula is stated to be .589 and the rate for overtime hours is stated to be .884. If, however, we were to use these figures as the basis for a computation of the amounts payable for straight time and for overtime respectively, the payment for straight time would be $23.56 (40 times .589) and the payment for overtime would be $5.30 (6 times .884). On that basis, Manne's total earnings for that week should have been $28.86, or 4c less than he actually did receive. The payroll record avoided that situation by the injection of two arithmetical errors, the combination of which picked up the extra 4c. It stated the total payable for straight time at $23.59 (which was 3c too much) and the total payable for overtime at $5.31 (which was 1c too much).

The situation described in the preceding paragraph was not isolated. Thus, throughout the entire period between the week ending October 16, 1943 and the week ending December 11, 1943, the overtime hourly rate which should have been given to McCole, upon the basis of his straight time hourly rate of .48, was .72. Instead, his overtime hourly rate was stated at .69 (Ex. 6, payroll records 94-103). Throughout the same period Torra, with a stated hourly rate of .6525, should have had an overtime hourly rate of .9787. Instead, his overtime hourly rate was stated at .9650 (id.).

The foregoing are simply a few among the many instances of a general pattern which is exhibited, in one form or another, on every payroll record and with respect to every plaintiff. There is not a single payroll record which is free from some error respecting either the hourly rate as computed with the formula or the derivative overtime hourly rate or the result of

the calculation which the proper use of the formula hourly rates would have produced.

The fractional character of some of the discrepancies must not divert us from the significance of their ubiquity. The full meaning of the formula will now be manifest. Its mission of enabling the employers to set in motion a chain of arithmetical operations designed to lead the calculator back to the number from which he had started was difficult of attainment in practice. That difficulty was occasioned by the fact that the hourly rate which the formula produced was invariably an infinitely repeating decimal. Unless, therefore, the defendants were prepared to maintain bookkeepers especially engaged in carrying out all these calculations to a very large number of decimal places, the cycle would never return to the original number to which it was ideally linked. The defendants realized the fundamental sterility of the entire procedure. So, knowing in advance the result which calculations carried out to an infinite number of decimal places would have produced, they forebore to trouble themselves with more than a perfunctory genuflection to the formula in practice. Having first determined the weekly wage which each employee was to receive, they then used the formula to derive a rough quotient. Then, when it became evident that the failure to carry out that rough quotient to a sufficient number of decimal places would precipitate a wrong answer, they picked up the slack by injecting the requisite quantum of corrective error either into the calculation of the overtime rate or into the multiplication of rate by hours. The whole process was perfectly analogous to the act of a schoolboy in a class in arithmetic who, having first looked at the answer in the back of the book, proceeds to "solve" the problem by simply writ-

ing down a series of numbers which are not too ostensibly irrelevant, and then draws a line and writes in the answer.

It is now possible to consider another purpose which the employers served in fixing the compensation in terms of flat weekly wages rather than at hourly rates. Just before the signing of this new contract, the National War Labor Board had announced that the rise in the cost of living since 1939 had rendered the employers' offer of a 10% increase "totally inadequate to correct the sub-standard conditions here confronting us" (Ex. 4, p. 25, lines 3-5; p. 26, last two lines to p. 27, line 2). In fact, one of the major purposes of that Directive Order had been to inaugurate a system of wage increases "justified by the rise in the cost of living since January 1, 1941" (Ex. 4, p. 3).

Accordingly, upon the signing of the new agreement, the employers had found it necessary to promise substantial wage increases (Ex. 1, p. 26).

Now if the new compensation had been expressed in terms of the hourly rates which the application of the formula to the weekly wage would have yielded, those alleged new hourly rates would have compared with the prior hourly rates of the respective plaintiffs as follows:

Plaintiff's Name	Old Hourly Rate (See calculations in Ex. 5)	New Hourly Rate (See Appendix A of Petitioners' Brief)
Del Rio	.530	.544
Manne	.530	.544
McCole	.420	.392
Peterson	.530	.544
Torra	.600	.604
J. H. Berger	.820	.769
Rodriguez (also known as Sanchez)	.620	.577

These figures tell a significant story. Of the 7 plaintiffs with whom we are here concerned, a statement of the new wage upon an hourly basis (as calculated with defendants' formula) would have revealed four to have received but insignificant increases, while the other three received substantial reductions. Thus, if the new wages had been stated in terms of the hourly rates which the application of the contract formula would have produced, it is fair to assume that the contract would never have been signed. Both the inadequacy of the pay raises to those employees who were fortunate enough to receive them and the discrimination against those employees whose rates were actually reduced would have constituted insurmountable barriers.

The expression of the new compensation in the form of a flat weekly wage enabled the employers to simulate substantial wage increases. The employees knew the amounts of the weekly wages which they had actually been receiving under the old Sloan agreement. On the other hand, they could not yet know the extent to which those prior wages had been legally inadequate. The lengthy calculations upon the basis of which they were retroactively to receive higher weekly wages for their entire employment period under the old Sloan agreement had not yet been made (64-5, Ex. 5). In the absence of information with respect to those calculations, it was inevitable that the employees should compare the new weekly wages with the weekly wages which they had actually been receiving rather than with the (then still unknown) weekly wages which they had legally been entitled to receive.

The situation may be epitomized briefly. At the time this new collective bargaining agreement was

entered into, the employees knew what their prior hourly rates had been, but did not yet know the extent to which their prior weekly earnings should have been higher. The latter calculations had not yet been made (Ex. 5). Accordingly, if the new wage had been expressed in terms of a stated hourly rate, that rate would have had to be substantially higher than the old one. But by stating the new compensation in terms of a weekly wage, it was simple to create the appearance of a substantial wage increase without actually giving it; since the coordinate of reference was the inadequate weekly wage which they had previously been receiving rather than the higher weekly wage which they had previously been entitled to receive.*

Accordingly, the employers' real object in stating the compensation upon a weekly rather than upon an hourly basis was that it enabled them to confuse the employees and seriously dilute their bargaining power.

* It was not merely the men who were misled. Thus, the National War Labor Board itself had stated that the new minimum hourly rate in lofts of this class would be "something over 59c" (Ex. 4, p. 34, the first sentence following the diagram). An examination of the new alleged hourly rates listed in Appendix A of petitioners' brief will establish the extent of that miscalculation. There can be no question but that the National War Labor Board itself was either completely confused or made the mistake of simply adopting a proffered calculation without checking it. Thus, any examination of the weekly payroll records even for the period succeeding the first wage increase will reveal that the minimum hourly rate which the application of the employers' formula would give was 56c for the regular employees and as low as 45c for the watchmen (Ex. 6).

The National War Labor Board's mistaken belief that the new contract would give the employees a substantial raise in wages was one of the reasons for its acquiescence therein (Ex. 4, p. 3, the second sentence of the second paragraph). But if the new hourly rates had been stated in the contract itself, they must necessarily have been higher; since the deception would then have been impossible.

It achieved that object in two ways. First, by causing the employees to take an extra-statutory workweek for granted, it diverted their attention from the very possibility that a 40 hour workweek might be equated with a living wage. In that manner, it frustrated the object of the Act to establish a special premium for overtime hours. Second, by inducing the employees to compare their new compensation with their old weekly wages (which had been held to be legally insufficient) rather than with their old hourly rates, it created the simulacrum of a substantial wage increase.

One final provision of the agreement must now be noted. It was expressly provided that if an employee other than a watchman worked more than 46 hours in any week or more than 9½ hours in any one day, those additional hours would be compensated at the rate of time and three-quarters the hourly rate as computed under the contract formula. For watchmen the base was 54 hours in any week and 11½ hours in any one day, and the rate for the additional hours was double time (Ex. 1, p. 29).

These provisions for additional compensation for hours worked beyond the 46 or 54 hour workweek which the contract standardized were the only provisions under which an employee could ever receive a premium above his flat weekly wage. They constituted a kind of practical construction that, under this employment relation, overtime premiums did not begin with the hours above 40 as contemplated by the Act, but with the hours above 46 or for watchmen above 54.

The Findings of the Courts Below.

The Circuit Court of Appeals unanimously approved the findings of the District Court that the plaintiffs had been employed "at fixed weekly rates of compensation" (finding of fact numbered "15"; pp. 83-4), that the contract formula "did not correctly calculate or determine the true hourly rates of their employment" (finding of fact numbered "17"; pp. 83-4), and that the plaintiffs did not receive compensation for their overtime hours "at rates equal to at least 1½ times the regular hourly rates at which they were employed" (finding of fact numbered "13"; pp. 83-4).

The Circuit Court of Appeals unanimously approved the finding of the District Court that the formula which the defendants invoked in order to derive the regular hourly rate from the fixed weekly wage "was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (finding of fact numbered "18"; pp. 83-4). It also unanimously approved the finding that the purpose of the formula "was to reduce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement" (finding of fact numbered "19"; pp. 83-4).

Concerning the defendants' formula for ascertaining the hourly rate, the Circuit Court of Appeals stated (p. 84):

> "It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down

> into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."

The Circuit Court of Appeals unanimously approved the finding of the District Court that the contract formula was not applied in situations wherein its usage would have caused the weekly wage to vary from week to week (finding of fact numbered "20"; p. 83).

We may here refer to petitioners' misinterpretation of a parenthetical utterance of the District Court set forth at folio 200 (petitioners' brief, p. 3, ll. 6-8). Petitioners' counsel would have that statement construed as a finding that the formula had been uniformly used in arriving at the weekly wage (id.). But this portion of the opinion must be read both in the light of finding numbered "20" (172-3) and in the light of the uncontradicted evidence of the defendants' own payroll records. The only reasonable interpretation of this portion of the opinion is that the District Court was referring to certain instances in which the defendants had used the formula in order to calculate hourly rate upon making adjustments for excusable or inexcusable absenses (141-6). Respecting such irregular and occasional uses of the formula, the District Court was stating the principle that an incorrect method of deriving the hourly rate from the weekly wage could not acquire validation simply from the fact that it may in certain instances

have been used (200). It will be noted in this connection that the Circuit Court unanimously adopted the finding that the formula rate was not adhered to so far as concerned the determination of the weekly wage (p. 83).

POINT I.

The principle of the decisions rendered below has been settled by this Court. There are no reported decisions to the contrary.

We have set forth the evidence in somewhat great detail in order to show that this was no inadvertent failure to pay the overtime premium required by the Act, but a deliberate attempt to continue a prior practice which avoided it. Nevertheless, the unanimously approved findings of fact, each adequately and amply supported, permit a very simple formulation of the determinative principle.

The question may be presented as follows:

May an employer pay his employees a flat weekly wage for workweeks which regularly include hours substantially longer than the maximum permitted by the Fair Labor Standards Act, and then, in order "to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way", bind his employees by a formula for calculating the hourly rate which violates the *Missel* principle and the effect of which is to relieve him from any additional payments for the regularly worked overtime hours?

We submit that a negative answer to this question directly follows from and is required by all the relevant decisions of this Court and of the several Circuit Courts of Appeals. There is no contrary view.

The decisions of the Courts below directly follow the decisions of this Court in *Walling* v. *Hardwood Co.*, 325 U. S. 419, *Walling* v. *Helmerich & Payne*, 323 U. S. 37, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. The determinative principle was stated by this Court in the *Hardwood* case as follows (325 U. S. 419, 425):

> "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

The attention of this Court is now directed to the decision in *Watkins* v. *Hudson Coal Co.* (C. C. A., 3rd Cir.), 151 Fed. (2nd) 311, cert. den. 66 S. Ct. 522. The *Watkins* case appears to us to be identical with the case here presented. We have the very identical formula for deriving an alleged hourly rate from the weekly wage (sponsored, incidentally, by the same attorneys by whom this formula has been sponsored). We also have the same attempt to use the formula to the end of indirectly inducing the employees to accept a compensation which they might otherwise have refused. The following extract from the opinion of that Circuit Court has, therefore, a peculiar relevance here:

> "For a formula to be productive of a regular rate and overtime rate such as will meet the requirements of the Act, it must not be a mere mathematical cloak under which to continue the same payment practices as hitherto. The rate established as the regular rate, in order to be adjudged actual and not fictitious must either

(1) bear a real relation to actual earnings as deduced by the *Missel* case principle or (2) it must be a genuine contractual decrease in wages, based upon bargaining, individual or collective. Under such a test of the requirements of the Act, the formulae of the instant case clearly fail. The evidence already marshalled is clearly indicative that the formulae were directed only to one goal, *i. e.*, to continue the old methods of payment for work while ostensibly meeting the requirements of the Act technically and technicalities are not enough." *Watkins* v. *Hudson Coal Co.* (C. C. A., 3rd Cir.), 151 Fed. (2nd) 311, 319, cert. den. 66 S. Ct. 522.

We know of no decisions which are contrary, or upon the basis of which the decisions of the lower courts could be reversed. Each of the decisions to which petitioners' brief refers to support the claim that there is a contrary view involves a case in which there had been an express finding by the trial court that the rate of compensation had originally been fixed at a stated sum per hour. *Bergschneider* v. *Peabody Coal Co.*, 142 Fed. (2nd) 784; *Shepler* v. *Crucible Fuel Co.*, 140 Fed. (2nd) 371; and *Walling* v. *Halliburton Oil Well Cementing Co.*, 152 Fed. (2nd) 622. Accordingly, each of those decisions is distinguished from the instant one by the circumstance that the finding of this District Court, adequately supported and unanimously approved, was that the employment in this case had been "at fixed weekly rates of compensation" (finding of fact numbered "15"; pp. 83-4).

POINT II.

Review by this Court could serve no useful purpose.

Petitioners' counsel argues that a review by this Court would save much needless litigation. However, the contrary is demonstrable. The Courts below have determined that, where the basis of the employees' compensation has been set at a flat weekly wage for a workweek which regularly included many overtime hours, the employers' statutory obligation to pay additional compensation for the overtime hours may not be circumvented by an artificial manner of calculating the regular hourly rate. It is inconceivable that this Court would hold otherwise. Accordingly, the only effect of granting a writ of certiorari would be to create a period of uncertainty which the actual certainty of the result could not justify.

POINT III.

The application for a writ of certiorari should be denied.

Dated, New York, October 9, 1946.

Respectfully submitted,

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